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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/505,466	03/14/2005	Stephen Foster	DEHNF-001US	8885
7663	7590	05/17/2007		
STETINA BRUNDA GARRED & BRUCKER			EXAMINER	
75 ENTERPRISE, SUITE 250			MITCHELL, TEENA KAY	
ALISO VIEJO, CA 92656				
			ART UNIT	PAPER NUMBER
			3771	
			MAIL DATE	DELIVERY MODE
			05/17/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

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<b>Office Action Summary</b>	Application No. 10/505,466	Applicant(s) FOSTER ET AL.	
	Examiner Teena Mitchell	Art Unit 3771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 27 February 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1, 18-30, 32-34 and 36-38 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 19-25, 27-30, 32-34, 36-38 is/are rejected.
- 7) ☒ Claim(s) 18 and 26 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Allowable Subject Matter***

The indicated allowability of claims 1,18-30, 32-34, and 36-38 is withdrawn in view of the newly discovered reference(s) to Huston et.al. (3,903,884). Rejections based on the newly cited reference(s) follow.

### ***Claim Rejections - 35 USC § 112***

**The following is a quotation of the first paragraph of 35 U.S.C. 112:**

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

**Claim 34 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement.** The claim(s) contains subject matter, which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. After review of previous arguments of applicant regarding claim 34 and support provided in the drawings based upon illustrated scaled width of approximately 0.219 inches, the examiner is representing the rejection as no such scale has been provided on the drawings. Thereby the limitations of "...the cross sectional area of the gas inlet is less than about one-fourth the cross sectional area of the at least one of the breathing and exhaust channels..." as such limitations were not in the originally filed disclosure and therefore constitutes new matter.

***Claim Rejections - 35 USC § 102***

**The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:**

**A person shall be entitled to a patent unless –**

**(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.**

**Claims 1, 19-24, 27-29, 32, 33, and 36-38 are rejected under 35 U.S.C. 102(b) as being anticipated by Huston (3,903,884).**

Regarding claim 1, Huston discloses a breathing device (20, 22) comprising in fluid communication, a breathing channel (at 33, 62) and an exhaust channel (70) extending from a junction there between; and a gas inlet channel (25, 34, 43; not air flow with arrows in Fig. 2) arranged so as in use to introduce gas into said breathing channel such that in use a positive pressure may be maintained in the breathing channel, wherein an axis of the gas inlet channel is laterally offset from an axis of the breathing channel (Fig. 2, gas inlet 25) at the point at which the gas inlet channel (25, 34, 43) introduces the gas into the breathing channel such that a part of the gas introduced by the gas inlet channel (25, 34, 43) bypasses the breathing channel to flow down the exhaust channel (70) to permit the pressure in the breathing channel during inhalation to be greater than the pressure in the breathing channel during exhalation.

Regarding claim 19, Huston discloses wherein the breathing channel (33, 62) is of a substantially constant cross-sectional area (Figs. 2, 6).

Regarding claim 20, Huston discloses wherein the breathing channel has substantially circular cross-section (Figs. 2, 6).

Regarding claim 21, Huston discloses wherein the gas inlet channel (25, 34, 43) opens into the breathing channel (33, 62)

Regarding claim 22, Huston discloses a breathing device (20, 22) comprising in fluid communication, a breathing channel (at 33, 62) and an exhaust channel (70) extending from a junction there between; and a gas inlet channel (25, 34, 43) arranged so as in use to introduce gas into said breathing channel such that in use a positive pressure may be maintained in the breathing channel, wherein an axis of the gas inlet channel is laterally offset from an axis of the breathing channel at the point at which the gas inlet channel (25, 34, 43) introduces the gas into the breathing channel, wherein the gas inlet channel (25, Fig. 2) is arranged to open into the junction between the breathing channel (33, 62) and the exhaust channel (70) on an outer side of the junction.

Regarding claim 23, Huston discloses wherein the gas inlet channel (25, 34, 43) is laterally offset from the axis of the breathing channel (33, 62) in a direction toward the exhaust channel (70).

Regarding claim 24, Huston discloses wherein the gas inlet channel (25) is inclined relative to the breathing channel axis (Fig. 2).

Regarding claim 25, Huston discloses at least two gas inlet channels (25, 34, 43) at different lateral offsets and inclinations (Fig. 2).

Regarding claim 27, Huston discloses wherein the gas inlet channel (25) is narrower than at least one of the exhaust and breathing channels (70, 33, 62).

Regarding claim 28, Huston discloses wherein the breathing (33, 62) and exhaust (70) channels are substantially linear and intersect one another at an angle of at least about ninety degrees (Fig. 2).

Regarding claim 29, Huston discloses wherein the breathing device is adapted to be attached directly to a face of a patient (via 22; Col. 4, lines 5-8).

Regarding claim 32, Huston discloses wherein the gas inlet channel (25, 34, 43) arranged to provide a degree of gas bypass such that increased pressure is provided during inhalation (Col. 7, lines 17-24).

Regarding claim 33, Huston discloses wherein the gas inlet channel (25, 43) has a cross sectional area that is smaller than a cross sectional area of at least on the breathing (33, 62) and exhaust (70) channels.

Regarding claim 36, note rejection of claim 23 above.

Regarding claim 37, Huston discloses a breathing channel (33, 62) and an exhaust channel (70) extending from a junction there between; and a gas inlet channel (25, 34, 43) arranged so as in use to introduce gas into the breathing channel such that in use a positive pressure may be maintained in the breathing channel, wherein an axis of the gas inlet channel (25, 34, 43) is directed towards an inner edge of the junction between the breathing (33, 62) and exhaust (70) channels, wherein the gas inlet channel is arranged to open into the junction between the breathing channel and the exhaust channel on an outer side of the junction (Figs. 1, 2, 6).

Regarding claim 38, Huston discloses wherein the gas inlet channel is arranged to provide a degree of gas bypass such that increased pressure is provided during inhalation (Fig. 2, Col. 7, lines 17-24 and Col. 8, lines 1-13).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of

**35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).**

**Claims 30 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Huston et.al. (3,903,884).**

Regarding claim 30, Huston discloses the claimed invention except for the breathing device adapted to be connected to a mask. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have the breathing device of Huston adapted to be connected to a mask because Huston states, "...a mouthpiece or other connector for transmittal to the patient..." since it is well known to use mouthpieces, mask, endotracheal tubes, nasal cannulas, nasal prongs to delivery gas to a patient as mere substitutes one well known delivery means for another.

Regarding claim 34, Huston does not disclose the gas inlet being less than about one-fourth the cross sectional area of at least one of the breathing and exhaust channels.

***Allowable Subject Matter***

Claims 18 and 26 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Response to Arguments***

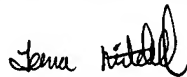
Applicant's arguments with respect to claims 1, 18-30, 32-34, and 36-38 have been considered but are moot in view of the new ground(s) of rejection.



Any inquiry concerning this communication or earlier communications from the examiner should be directed to Teena Mitchell whose telephone number is (571) 272-4798. The examiner can normally be reached on Monday-Friday however the examiner is on a flexible schedule.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Justine Yu can be reached on (571) 272-4835. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Teena Mitchell  
Primary Examiner  
Art Unit 3771  
May 8, 2007

TKM  
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